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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 429

WILLIAM L. MAXWELL ..... *Petitioner*

v.

DAN D. STEPHENS, Superintendent of the Arkansas State Penitentiary ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Both the majority and dissenting opinions of the United States Court of Appeals for the Eight Circuit, the Memorandum rendered by the United States District Court for the Eastern District of Arkansas, and the unanimous opinion of the Supreme Court of Arkansas have all been properly noted in the petition for writ of certiorari and have been set forth verbatim in the appendix which accompanies the petition.

JURISDICTION

The authority of which petitioner relies to invoke the jurisdiction of this Court is also contained in the petition.

STATEMENT

The petitioner, William L. Maxwell, is a condemned prisoner in the Arkansas State Penitentiary who was charged by felony information for the crime of rape of Stella Spoon during the early morning of November 3, 1961, in Hot Springs, Arkansas. Although the guilt of the petitioner is not in controversy here, a brief review of that tragic event is pertinent to the consideration of other issues in the petition.

The trial record sustains the perpetration of a most vicious and heinous crime. The victim, a rather frail woman, lived with her aged and crippled father in a sparsely populated area of Hot Springs. After she had retired for the evening, she was aroused by a noise from the front of the house. As she entered the living room a small night lamp in her father's adjoining bedroom alerted her to the presence of a person outside of the window. She immediately turned on a ceiling light revealing the petitioner cutting the window screen. The petitioner attempted to conceal his identity by pulling a stocking over his face, but this effort was unsuccessful and the stocking fell from his head. Miss Spoon immediately ordered the intruder to leave and dialed "operator" on her telephone to summons the police. By this time petitioner had entered the room through the window and knocked the young woman to the floor. Miss Spoon

did not have the opportunity to give any information, but the operator heard her screams for help and immediately made telephonic connection with the police. The address was subsequently determined and assistence was dispatched.

When the victim's father attempted to intervene to protect his daughter, petitioner threatened his life and brutally struck the elderly man rendering him totally helpless. When the police arrived, Mr. Spoon was found bleeding, incoherent, and afraid to open the house to the officers.

Before the officers had reached the house, petitioner had forcibly taken the young woman to a vacant lot where he overcame her stubborn resistance and savagely consummated sexual intercourse. Terrorized and shocked, the prosecutrix found her way to a street where searching police discovered her wet, barefooted and almost nude. The officers took her directly to a hospital and she was immediately examined by a physician. She was required to remain in the hospital for three days to recover from the injuries petitioner had inflicted upon her.

During the ordeal, the assailant had stated that his name was Willie Washington. Miss Spoon reported this information to the police and two persons, Willie Washington, Senior and Junior were brought to the hospital and were released when she declined to identify either. A Negro policeman, Officer Pettis, was brought to assist the investigation. After further description and failure to identify other suspects, Officer Pettis recalled seeing the petitioner earlier that evening with young Willie Washington. On the basis of what had become a rather detailed description of the assailant together with confirming the presence of petitioner near the area where the

crimes were committed earlier in the night, it was ordered that petitioner be brought to the hospital.

On these instructions, a policeman in a patrol car went to the Maxwell home where petitioner was then residing with his parents. Mrs. Maxwell, petitioner's mother, answered the officer's knock and, upon inquiry, went to determine if her son was in the house. She returned to tell the officer that he was in bed and invited the officer into the house and directed him to the room where Maxwell was staying with his two younger brothers, aged fourteen and nineteen. When the officer came into the bedroom with his flashlight he cast the light on Maxwell who was feigning sleep. Maxwell was aroused and advised that he was wanted downtown or at the hospital. Without asking why and not indicating any desire not to accompany the officer, Maxwell approached the closet as if to secure some clothing. At this time the policeman told Maxwell to dress in the clothes that were still wet and on a chair next to the bed. The petitioner complied without any protest. After Maxwell was taken to the hospital and identified by Miss Spoon, he was then confined in the city jail. Later in the day he was transferred to the Hot Springs County Jail in an adjoining county where he stayed over the weekend. The following Monday petitioner was brought back to Hot Springs, arraigned and placed in the county jail to await trial.

The trial judge appointed two local lawyers for the defense of petitioner, but these attorneys were discharged when petitioner employed private counsel. A continuance of the trial was granted and several motions were presented to the trial court. The trial was scheduled by agreement. Numerous witnesses testified including two experts from the Federal Bureau of Investigation and, although petitioner had confessed to the crime on two sep-

arate occasions, neither statement was used in the prosecution of the case.

The crime was proved by overwhelming evidence. The jury returned a verdict of guilty without a recommendation of leniency and petitioner was sentenced to death. The conviction was affirmed by the Supreme Court of Arkansas and rehearing denied. No application was made for certiorari to this Court. A petition for habeas corpus was filed in the United States District Court four days before the scheduled execution. The execution was stayed and a full hearing was conducted on all issues raised by petitioner.

The basis of the petition before the district court remains much the same as those presented in this petition for certiorari. In essence, petitioner challenges the circumstances incident to the procurement of his blue coat; the application of the death penalty for the crime of rape in Arkansas; the prerogative of a trial jury to not recommend leniency upon the rendition of a verdict of guilty of rape; and, the selection and composition of the petit jury panel in Garland County.

The statement contained in petitioner's brief is, for the most part, a fair resume of the circumstances surrounding the issues involved in this litigation. There are, however, several gross misrepresentations of testimony and facts which are consistent with petitioner's theory of the case. Rather than dwell upon those matters, in interest of brevity, appropriate remarks are noted at the applicable points of discussion in this brief. To foster continuity and the consideration of the issues presented by petitioner, the organization of the petition and the manner of reference is utilized to the several volumes of records now compiled in this prolonged and frequently considered case.

ARGUMENT

It is submitted that the petition for writ of certiorari does not disclose any substantial issue of law which warrants review by this Court. The several records in this case fail to support the conclusion that petitioner was deprived of any right made available by the Constitution of the United States. The respondent is benefited by the lengthy opinion of the Arkansas Supreme Court affirming the petitioner's conviction and the studious decision of the district court denying the writ of habeas corpus. That ruling was affirmed on appeal by the United States Court of Appeals for the Eighth Circuit. All of those decisions are eminently correct and are in concert, as applied to the facts disclosed in this case, with the several pronouncements of this Court.

I

The Validity of Procuring Petitioner's Coat in Absence of a Search Warrant.

It is asserted initially by petitioner that certiorari should be granted to determine the legality of search of petitioner's home in his absence, without a warrant, under a purported consent of his mother (p.18 of Petition). This argument is based upon a false premise. Both the district court and the court of appeals concluded that petitioner was living with his mother and father completely gratus and possessed no proprietorship in the room. These circumstances were carefully developed during the hearing in the district court.

It is against this background that petitioner seeks to invoke the provisions of the Fourth Amendment. Although the language has been often repeated and is

familiar, in view of petitioner's attack, it is well to note the specific terms of protection before proceeding further. It is provided:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

In support of his position, petitioner relies on certain alleged uncontroverted facts in connection with his apprehension and the subsequent procurement of the blue coat. As mentioned previously, either petitioner has been somewhat careless summarizing these events, or perhaps was overzealous in seeking support of his theory of the case. Even though respondent prefers the latter explanation, some clarification still must be offered to insure proper perspective and consideration of the issue.

The crime occurred near 3:00 a.m. on November 3, 1961. This was the approximate time recorded on the police radio log when Miss Spoon's screams were heard over the telephone (Ark. 250-251).

Since petitioner has abandoned his challenge of his arrest, it will suffice to say that pursuant to information and instruction, Officer Childress proceeded to the Maxwell home and learned that the petitioner was there. The officer was directed to the bedroom where the petitioner was found in bed. Upon advising petitioner that he was to be taken downtown, petitioner was directed to put on some wet clothes hanging near the bed. (D.C. 267) At this time Maxwell attempted to go to the closet to secure other clothes when the officer repeated the request. Without objection, Maxwell put on the damp clothes, but either purposely or inadvertently failed to get the blue coat that he had been wearing that night.

After petitioner had been identified at the hospital, it was discovered that the blue coat was missing. Although there is some deviation in the estimates of time, the coat was secured by the police officers near 5:00 a.m. (D.C. 243).

The circumstances of the second visit to the Maxwell house were touched briefly in the state court trial, but were described in detail at the hearing before the district court. One officer, Lt. Crane, testified before the trial jury as to the manner in which petitioner's coat was secured and that Mrs. Maxwell had consented to the search without objection (Ark. 333-334). His explanation that the entry was invited was uncontradicted, not withstanding the fact that Mrs. Maxwell attended the trial and was present when this testimony was related (Ark. 334). It is also imperative to remember that petitioner was sleeping in a room with two brothers, ages 14 and 19 (D.C. 143). If the actions of the investigating officers were contrary, petitioner was well fortified with several witnesses to contradict this testimony.

It should be obvious that no magistrate was available at the time the coat was obtained from petitioner's mother. Moreover, a judge or justice would not be available for perhaps four more hours. This would conservatively delay the time of recovery of the coat after issuance of a search warrant to 9:30 or 10:00 that morning. During this interim, there was a continuing danger that petitioner's family may have realized the importance of the article of clothing and would have either hidden or destroyed it. It will be recalled that petitioner had run afoul of the law numerous times. Although his family, was originally cooperative with the law enforcement officials, it appeared clear to the police, as it should to this Court, that there would be an inclination of the family to aid the petitioner

in his time of need even to the extend of destroying valuable evidence. This prospect cannot be ignored.

It is contended by appellant that his mother did not voluntarily consent to the officers entering the house and obtaining the coat. This assertion rests upon her comment that she was "afraid" not to let the officers in the house (D.C. 138). The facts of this case are, as observed by the district judge, that the officers knocked on the door, identified themselves, made a request for the specific article of clothing and were shown to the closet by appellant's mother (D.C. 143, 138, 242, Ark. 333-334). The record is replete that the officers were courteous and requested but one article. Mrs. Maxwell cooperated with the officers in every way (D.C. 138). She had no reason to refuse their entrance into the home. Although her husband was at work, Mrs. Maxwell was a mature woman of 38 years who had lived in the community for a long period of time. It cannot be presumed that she did not know a search warrant was necessary to enter the house if she demanded it. Her testimony before the district court indicates that she permitted the entry in respect for, rather than fear of, the police officers.

It is insisted by petitioner that the peculiar facts presented in this case present an important question of federal law which remains unsettled (p.22 of Petition). It is in this respect, the petitioner states that there is probably no issue more frequently litigated than the validity of a consent to a warrantless search.

In all deference, if consent is frequently controversial, it is a result of unique circumstances or a matter requiring resolution of conflicting testimony. In any event, it is submitted that neither the law nor the facts in the case before the Court contain any new or perplexing problems.

Each of the three decisions supporting the conviction relied upon well established rules within the guidelines as provided by this and many other courts while exhaustively reviewing the contentions of error. It was unnecessary for any of the courts below to tread upon an unmarked avenue of law. When bared of the phrases laboriously repeated by petitioner, the facts in this case are remarkably clear and uncontradicted. The officers visited the house on three occasions. The purpose of the first was to take petitioner to the hospital for identification. As related previously, the second presence of police officers was to secure a blue coat. The third was to obtain a convenient change of clothes for petitioner's use.

The incident of securing the blue coat can hardly be termed a "search" within the general connotation of the term. As observed by the district court petitioner's mother, Mrs. Maxwell, in all candor refused to deny that she gave the officers permission to enter the house and go to her son's room. Under these circumstances, the majority of the court of appeals remarked that it might be viewed as if the officers never entered the house, but that petitioner's mother brought the coat to them.

It is conceded that the rules of the federal courts implementing the Fourth Amendment of the United States Constitution have been made applicable to the states under the due process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643. It is also agreed that illegally obtained evidence cannot be used to aid criminal prosecution. *Boyd* v. *United States*, 116 U.S. 627. But a valid search may be made of the accused and the premises in conjunction with a lawful arrest.

A permitted search is proper and valid. *United States* v. *Roberts*, 223 F. Supp. 49 (E.D. Ark. 1963), 332 F. 2d

892 (8th Cir. 1964); *Commonwealth* v. *Tucker,* 76 N.E. 127, 189 Mass. 457, 7 LRA (N.S.) 1056.

A valiant effort is made by petitioner to the end that his mother needed his permission to give the police officers the coat. The basis of this argument is that the Fourth Amendment should be extended to offer protection in these circumstances. Again, the authority is contradictory to this theory. *Irvin* v. *State,* 66 So. 2d 288, cert. den. 346 U.S. 927.

It is undisputed that, although appellant had reached his majority, he still resided with his parents as their son, sharing a room with two brothers (U.S. 141, 147). Cf. *Gray* v. *Commonwealth,* 249 S.W. 769, 198 Ky. 610 (1923).

The circuit court of appeals, on review, was cognizant that the district court had applied the proper standards to reach the decision. There was no real disparity of case authority used in the separate opinions of the circuit court of appeals, but only a reaching of adverse factual findings.

The only criticism voiced by the dissenting circuit judge was that, in his view, the facts had established implied coercion. In reaching a contrary conclusion, the majority did not rely on a conflicting concept of law.

Hence, in this context, the argument for or against implied coercion was totally and essentially a resolution of factual considerations. Appelate courts have traditionally been hesitant to substitute their conclusions from a printed record in place of the hearing judge who had the benefit of seeing, hearing and experiencing the atmosphere of the hearing.

Thus, this case does not present new, unusual or conflicting concepts of law. On certiorari, this Court would only be satisfied that there was substantial evidence to support the conclusions of fact announced by the district court. There is, of course, one alternative. This would be to ignore the prior holdings of this Court and rule that there can be no valid consent to a search as a matter of law no matter what the circumstances.

This may seem to be, at first blush, a rather strong appraisal of what must be accomplished by granting certiorari. This conclusion is, however, inescapable.

II

The Constitutionality and Application of the Death Penalty for the Crime of Rape.

A. *The Alternate Penalties for the Crime of Rape in Arkansas Are Constitutional and Have Been Properly Enforced.*

The second principal topic contained in the petition is devoted to a condemnation of the alternative penalties of either a death or life imprisonment for those found guilty of the crime of rape. It is stated by petitioner that there are perhaps seventeen states that still retain capital punishment for rape and with one exception, all of these juridictions may be properly described as southern or border states (p.33 of Petition). It might also be observed that those same states identified by petitioner comprise the so-called "Bible Belt". So much for irrelevant geography.

To be sure, a statute imposing a greater punishment on one race than another would not only contravene the

Fourteenth Amendment to the Constitution of the United States, but would also offend the Constitution of Arkansas as well. Ark. Const., Art II, § 3. Since 1842 this jurisdiction, as well as many other states, has provided that the death penalty may be imposed, as in common law, for those found guilty of the crime of rape. (Ark. Stat. Ann. § 41-3403 (1947). In 1915, the General Assembly gave the jury the prerogative to assess either a life or a death sentence. Ark. Stat. Ann. § 43-215 (1947). If the jury does not render a verdict of life imprisonment, the death penalty is mandatory. Ark. Stat. Ann. § 43-2153 (1947). *Kelley* v. *State,* 133 Ark. 261, 202 S.W. 49, 54 (1918). Cognizant that there is no statutory distinction of the race of the defendant, the petitioner apparently concedes that there is no deprivation of due process by law in Arkansas, but a statute may be improperly applied even though valid on its face. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1885).

A substantial portion of petitioner's argument is devoted to a recitation of certain statistics of the number of persons executed for rape in the United States between 1930 and 1962. It is submitted by respondent that the compilations are not in the least persuasive and have no relation to this case. Parenthetically, it is noted that the percentage of Negroes executed for the crime of rape in Arkansas is proportionately smaller than the average of the other reported jurisdictions. It may be agreed that the states represented in Table 2 at page 35 of petitioner's brief have had substantially larger Negro populations than the balance of the other several states. Hence, no genuine comparison can be made with the entire United States.

Although respondent did not intend to assert that there is a higher crime rate among Negroes, the comments

of petitioner on the subject demand a response. The figures submitted by petitioner reflect that Negroes make up 89.5% of those persons executed for the crime of rape. The only conclusion which may be reached is that the incidence of rape by Negroes is substantially greater than that of whites. At the hearing on the petition for habeas corpus before the district court, petitioner was permitted to submit statistics from three counties in Arkansas. These figures were quite revealing, although no definite findings can be established. In Pulaski County, the charges of rape are almost balanced, eleven whites and ten Negroes, but non-whites make up less than 22% of the total population. Thus, the ratio of rape by Negroes is more than twice that by whites. In Jefferson County the crime by race is approximately proportionate. In Garland County, where the trial was conducted, there have been six white men and three Negroes accused of rape in the last ten years, but Negroes comprised less than 11% of the total population in Garland County (See 1960 Reports of the Bureau of Census). It is imperative to remember that in Garland County, there has never been a capital sentence for rape and only two men, one white and the other an Indian, have been sentenced to death for murder.

There is some criticism directed at the district judge by petitioner because the number of counties for inquiry was restricted, but no objection to this ruling was entered by petitioner (U.S. 313, 314).

The petitioner then quotes Senator Trumbull's remarks made during the consideration of the Civil Rights Act of 1866 (p. 38 of Petition). In all deference to the knowledge of the late Senator Trumbull there have been significant developments in the past one hundred years.

In the last fourteen years two white men and two Negroes have been executed for rape in Arkansas. This hardly smacks of disparity. Just how many Negroes have been found not guilty or guilty of lesser offenses that were not appealed cannot be determined. There is at least one reported case where a Negro found guilty of raping a white woman was given a life sentence. *Hamm* v. *State,* 214 Ark. 171, 214 S.W. 2d 917 (1948). In the words of the district judge, it is ironic that at the time petitioner was scheduled to die, a white man convicted of rape was executed. *Fields* v. *State,* 235 Ark. 986, 363 S.W. 2d 905 (1963).

Respondent agrees with petitioner that any conclusion of improper application of the death penalty must be gleaned from the facts evident in the case under consideration. In the final analysis, fair trials and justice are the concern of the courts, not statistics.

The statistical data completely ignores the evidence in each case which justified and compelled the highest penalty. It is remarkable that petitioner has not been so bold to say that the death penalty was not justified here.

Undisputedly, the petitioner has a burden of showing unconstitutional application of the death penalty. The jury discrimination cases are most analogous to the attack made here. Conceding *arguendo* that there may have been unconstitutional application of the death penalty and other crimes during the era of Senator Trumbull in 1866, this alone lends no discredit to future convictions. So, if it was proven that there had been jury discrimination in the past, but none shown in the panel under consideration, the contention would be summarily rejected.

It was aptly stated in *Brown* v. *Allen,* 344 U.S. 433 at 479 that: "Former errors cannot invalidate future trials."

The quantum proof required to demonstrate unlawful application must be " . . . shown by cogent evidence that the officers knowingly permitted others . . . " to receive the death penalty. To reiterate the records here are void of such a conclusion. *Hickinbotham* v. *State,* 227 Ark. 1032, 303 S.W. 2d 565.

Although the contention raised by petitioner is unique it is not without precedent. It should suffice to note that all authorities discovered by respondent is opposed to the proposition. *Maxwell* v. *Stephens,* 229 F. Supp. 205 (E.D. Ark. 1964); *Maxwell* v. *State,* 233 Ark. 700, 370 S.W. 2d 113 (1963); *Mitchell* v. *State,* 233 Ark. 578, 346 S.W. 2d 201; *Thomas* v. *Florida,* 92 So. 2d 621, cert. den. 354 U.S. 925; *Pace* v. *Alabama,* 106 U.S. 583.

The argument of petitioner, if accepted, would have ludicrous results. He would have this Court reverse convictions not on the basis of each case, but solely upon questionable history. The hazards are numerous. The question of a woman under a death sentence would demand reversal, according to petitioner, for the lack of statistics alone. A dual system of justice and punishment would be created: immunity for Negroes while Caucasians would be required to remain subject to the death penalty. Thus, petitioner would reverse the situation that he complains to be unconstitutional.

Petitioner asks that this Court grant *certiorari* to confirm petitioner's attempt to apply the "prima facie"

evidence principle (p. 38 of Petition). This seems hardly necessary since the records are totally void of any evidence that petitioner's trial jury improperly applied the death penalty.

Obviously doubtful of the firmness of his position, petitioner then recklessly accuses and ridicules the criminal administration of justice in Arkansas (p. 39 of Petition). In reference to the "continuing system of discriminatory administration of justice," respondent invites attention to *Walton* v. *State,* 232 Ark. 86, 334 S.W. 2d 657 (1960), where the Arkansas Supreme Court ignored the Negro attorney's nine-sentence brief, and found error on its own initiative, reversing the Negro defendant's murder conviction. Remarks are then directed by petitioner to Arkansas' long-time practice of systematic jury exclusion with citation to the only two cases in Arkansas where a federal court concluded racial discrimination, and surprisingly enough these two cases came from one county. There have been many affirmations by the federal judiciary of constitutional jury selection in Arkansas. *Dorsey* v. *State,* 219 Ark. 101, cert. den., 342 U.S. 851; *Haraway* v. *State,* 203 Ark. 912, cert. den., 317 U.S. 648; *Black* v. *State,* 215 Ark. 618, cert. den., 338 U.S. 956; *Moore* v. *Henslee,* 276 F. 2d 876 (8th Cir. 1960); *Moore* v. *State,* 229 Ark. 335, cert. den., 358 U.S. 946; *Payne* v. *State,* 226 Ark. 910 reversed on other grounds, 356 U.S. 560.

The lack of substance to the contentions of the petitioner have been revealed. In view of the law and the facts discerned in these records, there is no merit to the allegations of the petitioner.

B. *The Arkansas Statutory Penalties for the Crime of Rape Are Not Violative of the Eighth Amendment.*

At sub-topic II. B. of the petition it is asserted that the Courts of Appeals for both the Eighth and Fourth Circuits have invited the consideration of the United States Supreme Court to determine if the imposition of the death penalty for the crime of rape is violative of the Eighth Amendment to the Constitution of the United States. (p. 44 of Petition). Respondent disputes the correctness of this conclusion. It is offered rather, that ". . . whatever personal attitudes lower federal court judges as individuals might have toward capitol punishment for rape . . ." those personal convictions are restrained in favor of the long existent expressions of the legislatures of the several states.

In view of the precise separation of the branches of government provided by the United States Constitution and the authority vested in the states, federal and state judges have properly refrained from exercising their individual moral considerations. The courts refuse to question the expediency of an enactment under review for the responsibility rests on the wisdom and conscience of the legislative bodies. E.g. *Beauharnais* v. *Illinois,* 343 U.S. 250 (1951). This established rule of abstinence should be particularly applicable in an area so well fortified against invasion, judicial or otherwise, as the punishment of crimes. Never before has an argument been made that punishments for crimes must necessarily be consistent in every jurisdiction of this Nation.

It is apparently conceded by petitioner that the brutal circumstances found in this case would satisfy even the

criticism voiced by the dissenting justices in *Rudolph* v. *Alabama,* 375 U.S. 889 (1963). The challenge then does not rest on the basis that the sentence was not "consistent with civilized standards" but if the submission of punishment to the jury without directions or guides is *per se* unusual within the prohibition of the Eighth Amendment.

It is argued by petitioner that the trial jury was not invited to consider the extent of physical harm to his victim, the moral heinousness of the act, the prospect of reformation, or the deterrent effect of a death sentence. It is further stated by petitioner that the jury was permitted to choose between life and death for any reason or perhaps as a whim (pp. 44, 45 of Petition). A more critical indictment of the jury system cannot be imagined. The identical argument would be as persuasive in opposition to a punishment which offers a jury any latitude in severity. A trial judge is not required to give the reasons or matters considered in support of a minimum sentence as opposed to a greater sentence. The sanctity of jury deliberations has been recognized as a requisite in the American system of jurisprudence. See Ark. Stat. Ann. § 43-2204 (1947), *Wallace* v. *State,* 180 Ark. 627, 22 S.W. 2d 395 (1929). And the criticism voiced by petitioner does not reach a vital aspect of the decision as decided in *Jackson* v. *Denno,* 378 U.S. 368 (1964). Moreover, no request was made by petitioner that the jury was to make special findings or render a special verdict. The jury was only asked, with the permission of the petitioner, to determine his guilt and sentence.

It may be presumed with confidence that all of the subjects mentioned by petitioner, such as the extent of physical harm, mercy, the sufficiency of punishment, etc., were argued to the jury by the attorneys. The finding

of guilt cannot, in all candor, be suspected to have been without reason or as a whim. It is futile for petitioner to suggest that during the lengthy trial the jury had not been furnished substantial quantities of compelling evidence of the physical harm suffered by the prosecutrix and every detail of the crime. It is certainly doubtful that an instruction was required to enlighten the jury as to the "moral heinousness" of the crime when the very nature of rape is adverse to the most fundamental concept of civilization.

Lest it be forgot, the victim of petitioner's brutal and vicious assault was deprived of her constitutional and God given rights. Anything more precious to the aggrieved woman cannot be imagined. Most should agree that Miss Spoon should enjoy security in her home with her father, that her body should not be violated, her father mercilessly beaten, her life threatened, or terrorized. This case does not present the opposition of carefully balanced constitutional rights, but demands, for the sake of justice, that the death penalty be imposed.

It is too easy for petitioner to contend that his sentence is unusual, purposeless and wanton, as to be unbelieveable under the circumstances. A death sentence for rape can hardly be described as either unusual or wanton. To do so would ignore the history of perhaps the most villainous and highest of crimes. It is true that penologists and criminologists as well as law enforcement officers possess a divergence of views as to the benefits to be derived from the existence of a death penalty and the purposes that may be served.

If, however, it can be validly concluded that punishment by fine or imprisonment acts as a deterrent to the

commission of crimes, then most assuredly the existence of the death penalty also presents a substantial restraint.

Finally, even though the United States Department of Justice may desire the abolition of the death penalty, as indicated by footnote 41 on page 45 of the Petition, it is significant that the matter was properly addressed to the Congress.

III

The Selection and Composition of the Petit Jury Panel.

The final argument contained in the petition for writ of certiorari urges that the statutory procedure for the selection of petit juries in Arkansas together with the method that the jury commissioners employed to assimilate the jury panel, is violative to the Fourteenth Amendment to the Constitution of the United States. This contention was rejected by both the district court and the unanimous opinion of the Eighth Circuit Court of Appeals.

Initially, it is imperative to note that the question, as presented in the petition for certiorari, is not identifiable with the assertion originally phrased in the petition for habeas corpus. Specifically, the petition alleged:

> ". . . That the poll tax books used by the jury commissioners in selecting the persons to serve as jurors for the term in which petitioner was tried designate the color and race of persons eligible to be called for jury duty; . . . and it has been the practice over the years for the jury commissioners to use poll tax books of Garland County, Arkansas, which designate the race and color of eligible persons to serve as jurors in making the selection

> and designation of perspective jurors, all in violation of the Constitution and laws of the United States."

Thus, there was no direct challenge of the statutory requirements of Arkansas to designate the race of each elector, but only to the use of records which contained identification of race. Furthermore, no issue of invalidity was made in petitioner's argument to the district court and little mention was made on appeal before the Eighth Circuit Court. Be that as it may, neither of the courts below recognized petitioner's vague assertions as a direct attack on the constitutionality of the Arkansas statutes.

It seems all too clear that until the petition for certiorari, the criticism launched against racial identification on poll tax records was more in the traditional vein as but one of an aggragate of circumstances which might conclude consideration of race during the selection of the jury panel. E.g. *Bailey* v. *Henslee,* 287 F. 2d 936 (8 Cir. 1961), cert. den. 368 U.S. 877. What seems to have happened is that prompted by the comment of the court of appeals concerning the constitutionality of the race identification statute led petitioner to manufacture this as an issue for certiorari when in fact petitioner failed to follow proper procedure to initially assert and save the matter for review. Considering the status of these records, this Court should follow its long established rule and refuse to inquire into matters which were not properly submitted to the lower courts for adjudication. Cf. *Sutton* v. *Settle,* 302 F. 2d 286 (8 Cir. 1962), cert. den. 372 U.S. 930.

An attempt is made to show that the Arkansas statute requiring racial identification is unconstitutional on the basis of *Hamm* v. *Virginia State Board of Elections,*

230 F. Supp. 156 (E.D. Va. 1964) aff'd sub nom. *Tancil* v. *Woolls,* 379 U.S. 19. There, it was stated:

> "Of course, the designation of race, just like sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se. For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege. If the purpose is legitimate, the reason justifiable, then no infringement results. The infirmity of the provisions just mentioned lies in their mandate of separation of names by race."

With this language foremost, the statutes in controversy must be reviewed.

The jury commissioners are required to select those individuals who meet the statutory qualifications. Ark. Stat. Ann. §§39-101, 39-206, and 39-208 (1947). In Arkansas, only qualified electors may serve as jurors. Ark. Stat. Ann. §3-104.2 (1947). An elector must possess a current poll tax. Amend. VIII, Ark. Const., Art. III, §1. Similar requirements have met approval. *Gibson* v. *Mississippi,* 162 U.S. 565 (1896); *Brown* v. *Allen, supra,* 344 U.S. at 474, and 472 footnote 22.

The poll tax books are required to note the designation of the elector's race. Ark. Stat. Ann. §3-227(b) (1947). The list of poll tax payers are compiled as a poll tax book, published and distributed to the election judges by the county board of election commissioners. Ark. Stat. Ann. §3-118 (1947). There is no separation of names by race or different colored papers as discovered in *Hamm.*

A perusal of the previously noted statutes makes it abundantly clear that, consistent with most requirements

of voter registration, a person must give information, among other things, of his color. The obvious purpose of requiring this and other data is to assure a conclusive means of identification of the particular person and his eligibility to vote. The interest of the State is legitimate and justifiable. The practice of identifying persons by color has won approval by usage in almost every conceivable means of compilation.

It might be noted, parenthetically, particularly in view of the disturbance expressed in the past, that the poll tax as a requisite for voting and jury service has been abolished in Arkansas. Ark. Const. Amend. 51, §17. Temporary remedial legislation was required to be adopted. Act 126, Acts of Arkansas 1965, approved March 1, 1965.

Conceding *arguendo* that a valid question exists as to the use of poll tax records which contain racial identification, the court of appeals properly applied and followed the many pronouncements of this Court in disposing of the subject. The conclusion was clearly measured by the applicable standards and is consistent with the spirit of constitutional jury selection.

Jury duty has been described by the Supreme Court of Arkansas as a right incident of citizenship, subject to statutory regulations. *Buchanan* v. *State,* 214 Ark. 835, 218 S.W. 2d 700 (1948). It is incumbent on every court to guard the constitutional guarantee of a fair trial by jury. *Anderson* v. *State,* 200 Ark. 516, 139 S.W. 2d 396 (1940). It is presumed that a jury meets all constitutional requirements and the burden of establishing the discrimination is upon the accused. *Tarrance* v. *Florida,* 188 U.S. 519 (1903). The mere allegation of discrimination without supporting evidence is insufficient. *Carter*

v. *Texas,* 177 U.S. 442 (1900). A jury is not required to have proportional representation of all groups of the community in order to assure equal protection of law. *Virginia* v. *Rives,* 100 U.S. 313 (1879). Inequality or disproportionment of the number of Negroes finally selected as veniremen does not in itself constitute discrimination. *Akins* v. *Texas,* 325 U.S. 398 (1945). While a defendant has no right, constitutional or otherwise, to even have his race represented on a particular panel proportional racial limitation as such is forbidden. *Cassell* v. *Texas,* 339 U.S. 282 (1950). Simply stated, the race of the veniremen has no bearing and should not be considered by the jury commissioners. *Martin* v. *Texas,* 200 U.S. 316 (1906).

Of the three jury commissioners, one was a Negro and the other two were white. Cf. *Moore* v. *Henslee,* 276 F. 2d 876 (8th Cir. 1960). The jury commission has been so composed in Garland County for many years (U.S. 47). The panel in question had been selected approximately two months before the crime was committed. Cf. *Collins* v. *Walker,* 329 F. 2d 100 (5 Cir. 1964), rehearing denied, 335 F. 2d 417. A delay in trial date of only two or three weeks would have placed the trial of the case in a new term of court with a new panel of jurors. See Ark. Stat. Ann. § 22-310 (1947) for term of Garland County Circuit Court.

Traditionally, the cases involving discrimination in jury selection have been illustrated most dramatically by resorting to a statistical analysis showing the proportion of Negroes serving on the juries as opposed to those eligible for jury service. This tactic possesses a valuable convincing quality. Here, petitioner did not choose to employ such an approach or appraisal for the record

discloses that there was a greater proportion of Negroes participation on the jury panel than the Negro population of Garland County. *Maxwell* v. *Stephens, supra,* 229 F. Supp. at 215.

The petitioner suggests that there is judicial authority that any racial identification would, in itself, condemn the jury list and relies extensively on the case of *Avery* v. *Georgia,* 234 U.S. 559. This is, at the very least, misleading. Even a cursory study of that decision reveals that discrimination was concluded only after a finding that there was both a device of racial designation and discriminatory results. On the other hand, in *Brown* v. *Allen,* 344 U.S. at 480, there was a device of racial identification, but in the absence of finding actual discrimination, the conviction was affirmed.

The efforts of the jury commission confirm their honest dedication to the selection of a proper and valid jury panel. The anemic efforts of petitioner to show otherwise is unavailing.

Considering the status of the record, at the very least a serious question of waiver is presented. The facts and the law would both dictate that waiver of the opportunity to challenge the petit jury had been established. Notwithstanding that the selection and composition of the petit jury panel was entirely valid, it is urged that waiver also deserves a place of prominence in the consideration of this issue.

As a pure legal concept, waiver by a criminal defendant is difficult to prove under the rule of *United States ex rel Goldsby* v. *Harpole,* 263 F. 2d 71 (5th Cir. 1959) cert. den. 361 U.S. 838, as enlarged by *Fay* v. *Noia,* 372 U.S. 391 (1963). In practice, proof of waiver is almost

beyond the realm of possibility. One significant impediment is the rule of privileged communication. Ark. Stat. Ann. § 28-601 (1947). Another obstacle peculiar to this case is the substitution and replacement of the trial attorney by the appellate attorneys.

Still, this record sustains an excellent example of waiver which meets and satisfies both the spirit and the letter of *Fay* v. *Noia*. It was shown that the trial attorney for petitioner was infinitely aware of the procedure and the traditional grounds for moving to quash a petit jury panel on account of racial discrimination (U.S. 274-278). The attorney made a dedicated effort to discover any substantial basis to challenge the panel (U.S. 278-281, 298-303). After his exhaustive investigation, petitioner's trial attorney discussed the composition of the petit jury panel with the petitioner's parents and discussed the entire preparation of the trial with the petitioner and his parents (U.S. 291-292). The trial attorney for petitioner stated on cross examination that he did discuss the jury with petitioner, but did not confer with him in regard to a motion to quash (U.S. 297-298). Of course, petitioner denied that his attorney ever mentioned the jury panel to him (U.S. 305). From the record, it can be fairly surmised that the jury panel was a prime subject of conversation not only with the parents, but with petitioner himself. The petitioner and his family were personally acquainted with a substantial number of the petit jurors (U.S. 293-294). The use of the panel was apparently one of the tactics that petitioner employed in the trial (U.S. 284).

There can be no contention in this case that there is a hesitancy to challenge juries in Arkansas. On the contrary, this tactic appears to be quite popular in this jurisdiction, and is employed frequently by both white

and Negro attorneys. Thus, this case is significantly different from *United States ex rel Goldsby* v. *Harpole, supra.*

It is sincerely urged, notwithstanding the abundance of evidence sustaining a valid and constitutional jury panel, that this Court confirm that appellant waived the right to object to his trial jury. The petition cannot be described as an uneducated or unsophisticated defendant. He made average grades (B's, C's and D's) to high school when he quit for some reason, but continued his education in the service (U.S. 160, 161, 166, 185). Moreover, he had been educated in criminal procedure by experience (U.S. 197, 198). It should be appropriate to paraphrase the often quoted language that testimony of nonwaiver expressed in general terms is insufficient to rebut. *Reece* v. *Georgia,* 350 U.S. 85 (1955). To conclude otherwise, would be an effective barrier which could never be overcome.

CONCLUSION

The petitioner has failed entirely to substantiate any issue of his petition and has been unable to demonstrate that the opinion of the court below is contrary to the pronouncements of this Court. Furthermore, it is sincerely urged that petitioner has not shown any new or unique circumstances which merit consideration. The petition for writ of certiorari should be denied.

Respectfully submitted,

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